



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sentinel Electronics, Inc.

File: B-221914.2, B-221915.3, B-221916.3, B-221917.2, B-221918.2,
B-221919.2, B-221920.3, B-221927.2, B-222327.2, B-222368.3

Date: August 7, 1986

DIGEST

1. Agency is not prohibited by the Federal Acquisition Regulation, 48 C.F.R. § 16.503(b), from entering into requirements contracts for complex spare parts, whether or not they are commercial or commercial-type products.
2. Large disparity between minimum and maximum order limit on requirements contract does not indicate government estimates of requirements are not based upon the best information or made in bad faith. Solicitation properly based evaluation on government estimates rather than minimum order limits.
3. Solicitations that impose cost risks on the contractors are not improper.

DECISION

Sentinel Electronics, Inc. (Sentinel), protest 10 small business set-aside solicitations^{1/} for various spare parts for missile systems, issued by the United States Army Missile Command, Redstone Arsenal, Alabama.

The awards will be for requirements contracts for a definite quantity for the first program year. Estimated quantities are identified in the solicitation for 4 additional program years. Sentinel contends that these items cannot be procured under requirements contracts because they are not commercial or commercial-type products. Sentinel also complains of various solicitation provisions, which it contends place too much cost risk on contractors. We deny the protests.

Sentinel has previously protested these and other Redstone Arsenal solicitations on similar grounds. We dismissed these protests as

^{1/} DAAH01-86-B-A199 for guided missile tests sets (B-221914.2); DAAH01-86-B-A111 for power supplies (B-221915.3); DAAH01-86-B-A258 for power supplies (B-221916.3); DAAH01-86-B-A175 for electrical test sets (B-221917.2); DAAH01-86-B-A207 for radar test kits (B-221918.2); DAAH01-86-B-A174 for deflection coil drives (B-221919.2); DAAH01-86-B-A166 for electronic components (B-221920.3); DAAH01-86-B-A110 for electronic components (B-221927.2); DAAH01-86-B-A201 for power supplies (B-222327.2); DAAH01-86-B-A177 for power supplies (B-222368.3).

academic when the Army issued amendments intended to meet Sentinel's objections. These protests followed.

Sentinel contends that the Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.503(b) (1985), does not allow the use of requirements contracts for these procurements. That regulation provides:

"(b) Application. A requirements contract may be used when the Government anticipates recurring requirements but cannot pre-determine the precise quantities of supplies or services that designated Government activities will need during a definite period. Generally, a requirements contract is appropriate for items or services that are commercial products or commercial-type products (See 11.001).. . ." (Emphasis supplied.)

Sentinel alleges that since the items being procured here are neither commercial products nor commercial-type products, requirements contracts cannot be used. Sentinel states and has provided documentation that these are complex technical items and must meet military specifications that are far in excess of those required of commercially available products. Some of the components of these items are restricted as to the source of the parts.

The Army responds that FAR, § 16.503(b), does not categorically limit the use of requirements contracts to commercial and commercial-type products. The Army also states that since most spare parts have similar commercial counterparts or some foundation in the commercial marketplace, requirements contracts are appropriate for use, since the quantities and delivery scheduling of the spare parts is not absolutely known and considerable price advantages and cost savings can be achieved by obtaining spare parts from a single source for 5-program years. Although Sentinel disagrees with the Army's method of contracting for its needs, the determination of the government's needs and the best method of satisfying them are primarily the responsibility of the procuring activity. Kisco Company, Inc., B-216953, Mar. 22, 1985, 85-1 C.P.D. ¶ 334.

With regard to the specific limitation on the use of requirements contracts noted by Sentinel, we ruled on the identical limitation in Armed Services Procurement Regulation (ASPR), § 3-409.2(b) (1964 ed.), the predecessor regulation to FAR, § 16.503(b). In 50 Comp. Gen. 506, 508 (1971), we held this limitation is permissive in nature and should not be construed as an absolute prohibition against the purchase of items that are not commercial or commercial-type products.^{2/} The Army has

^{2/} Similarly, in Grey Advertising, Inc., 55 Comp. Gen. 1111, 1139, (1976), 76-1 C.P.D. ¶ 325, and B-154594, Sept. 22, 1964, aff'd, Dec. 18, 1964, we interpreted a similar restriction on the use of indefinite quantity type contracts that was contained in ASPR § 3-409.3(b) (1964 ed.) the predecessor regulation to FAR, 48 C.F.R. § 16.504(b). That regulation provided that indefinite quantity type contracts "should be used only when the item or service is commercial or modified commercial." We held that the use of the word "should" in this provision does not impose a mandatory prohibition and does not confer any rights on offerors.

advanced a number of valid business reasons to use requirements contracts for these procurements, e.g., the reduction of total contract costs because a large quantity of items will be purchased from one firm over a 5-year period, which will permit the contractor to achieve savings and offer a lower bid price. Consequently, whether or not the items being procured here are commercial or commercial-type products, the Army is not prohibited from using requirements contracts. This protest basis is therefore denied.

Sentinel also protests that the solicitations place too much cost risk on the contractor, despite the amendments issued by the Army in response to Sentinel's earlier protests. Sentinel complains that although an estimated quantity of items per year is specified for evaluation purposes for the 4 latter years, the government is not required to order that number of items under the contracts. Instead, the solicitations provide for a maximum and minimum order amounts for each year. In all instances, the minimum order is less than half of the estimated quantity and the maximum order is from 20 to 25 percent more than the estimated quantity. Sentinel argues that the wide disparity between the minimum and maximum order limitation does not permit efficient production procedures and shows the government does not have realistic estimates for its needs. In this regard, Sentinel states that many of the components of the items are, in effect, custom-made, which necessitates large set-up charges that will be excessive if only minimum quantities are ordered. Sentinel suggests that the minimum order quantities instead of the estimated quantities should be used for bid evaluation.

We have held that requirements contracts are valid if the estimates of the probable amount of goods or services to be generated was determined in good faith and is based on the best information available. 50 Comp. Gen. 830, 837 (1971); Hero, Inc., 63 Comp. Gen. 117 (1983), 83-2 C.P.D. ¶ 687. It is the protester's burden to establish that the stated estimates are not based on the best information or are otherwise deficient. Richard M. Walsh Associates, Inc., B-216730, May 31, 1985, 85-1 C.P.D. ¶ 621.

The only evidence proffered by the protester to question the estimates here is the disparity between the minimum and maximum order limitations. However, these limitations are included in the solicitations solely to remove some of the uncertainties and risks from the contractor's shoulders. FAR, 48 C.F.R. § 16.503(a)(2) (1985), requires that a maximum limit of the contractors obligation to deliver and the government's obligation to order be stated "if feasible," and that the contract "may" also specify maximum and minimum quantities that the government may require under each individual order and the maximum that it may order during a specified period of time. However, it is clear that no minimum guarantees are required for a valid requirements contract to be enforced because the agreement to procure all of the agency's requirements, without minimum guarantees, constitutes adequate consideration. 50 Comp. Gen. 506, 508; Duroyd Manufacturing Co., B-213046, Dec. 27, 1983, 84-1 C.P.D. ¶ 28. Consequently, we do not believe the disparity between

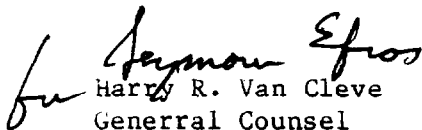
minimum and maximum orders indicates that the government estimates are not based on the best information or resulted from bad faith. Space Services International Corp., B-207888.4 et al., Dec. 13, 1982, 82-2 C.P.D. ¶ 525.

Also, since the Army's estimated quantities are presumed to be the realistic estimates of the latter-years requirements, there is no reasonable basis to evaluate these years based upon the minimum orders amounts. See All Weather Contractors, Inc., B-217242, July 23, 1985, 85-2 C.P.D. ¶ 71. The risk that less quantities than the estimated quantities may actually be ordered does not require that the minimum quantities be used to evaluate bids. Id.

The protester also contends that there is no protection under the solicitation for the successful bidder, if restricted source component manufacturers are no longer in business when orders are placed during the 5-year contract period. The protester also asserts that the economic price adjustment clause, which was inserted in the solicitations as a result of Sentinel's earlier protests, does not provide sufficient protection to the successful bidders, since only 75 percent of the price is protected and a restricted source vendor's price may not conform to the general economic conditions reflected in the relevant economic indices, under that clause.

We have held that it is within the ambit of administrative discretion to offer to the competition a proposed contract imposing maximum risks upon the contractor and minimum administrative burden on the government, Duroyd Manufacturing Company, B-213046, supra. The fact that solicitations may impose risks on the contractors does not render them improper. Richard M. Walsh Associates, B-216730, supra. In this case, the Army has apparently made a good faith effort to balance the contractor's and the government's risks and business interests in drafting the solicitations and we cannot conclude that the contractor's risks are unreasonable.

In view of the foregoing, the protests are denied.

for 
Harry R. Van Cleve
General Counsel